Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

CHUN HUA MUI, JOSEFA GANTES, and OI FONG TSE TSUI, On Behalf Of Themselves And All Others Similarly Situated,

Petitioners,

v.

UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO; KNITGOODS WORKERS' UNION, LOCAL 155 AND BLOUSE, SKIRT, SPORTSWEAR, CHILDREN'S WEAR AND ALLIED WORKERS' UNION, LOCAL 23-25,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a union, which prosecutes an arbitration on behalf of members of an affiliated union, and is the only union which may initiate such arbitration, owes those members a duty of fair representation or similar fiduciary duty.

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Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit was rendered on May 23, 2000. The disposition is not published, but the opinion appears in the "Table of Decisions Without Reported Opinions" at 123 F.3d 626. The opinion of the United States District Court for the Southern District of New York, dated August 31, 1999, is reported at 139 Lab. Cas. (CCH) ¶ 10,524. Petitioners' timely filed Petition for Rehearing was denied by Order dated June 16, 2000. These opinions are reproduced as Appendices A, B and C respectively.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion on May 23, 2000. Petitioners filed a Petition for Rehearing, which the United States Court of Appeals for the Second Circuit denied on June 16, 2000. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the Garment Industry Proviso (codified at 29 U.S.C. § 158(e)), which provides, in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any

> contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered in to heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. Provided . . . further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

STATEMENT OF THE CASE

This case involves a class action brought on behalf of approximately 600 former workers (the "Mademoiselle Workers") of Mademoiselle Knitwear, Inc. ("Mademoiselle") alleging a breach of the duty of fair representation ("DFR") or similar fiduciary duty against two union locals — Blouse, Skirt, Sportswear, Children's Wear and Allied Workers

Union, Local 23-25 ("Local 23-25") and Knitgoods Workers' Union, Local 155 ("Local 155") — and an international union — Union of Needletrades, Industrial and Textile Employees, AFL-CIO ("UNITE"), successor to the merger between the International Ladies Garment Workers' Union and the Amalgamated Clothing & Textile Workers Union (Local 23-25, Local 155 and UNITE are referred to collectively as the "Union Defendants"). The First Amended Complaint, filed on October 30, 1997, also alleged a breach of contract claim against Liz Claiborne, Inc. ("Claiborne").

At issue here is the unionization of the Mademoiselle Workers, and their subsequent abandonment at the hands of their union officials. The Mademoiselle Workers were induced to join Local 155, an affiliate of UNITE, on the basis of a promise from UNITE of a work commitment from Claiborne and the benefit the Mademoiselle Workers would receive from that work commitment. UNITE and Local 23-25 negotiated that work commitment. When Claiborne breached this commitment, an arbitration (the "First Arbitration") was commenced by UNITE acting through 23-25 (the party to the collective bargaining agreement with Claiborne) against Claiborne to defend the rights of the Mademoiselle Workers and to enforce the work commitment. When Claiborne breached the award issued in the First Arbitration, a second arbitration was commenced by UNITE, again acting through 23-25 (the "Second Arbitration") (the First Arbitration and the Second Arbitration are referred to, collectively, as the "Arbitrations"), in part to recover money damages for the breach of the award issued in the First Arbitration. Damages in the Second Arbitration were estimated by the Union Defendants in an amount exceeding $20 million.

During the course of the prosecution of the Second Arbitration the Union Defendants advised their attorney to lose the arbitration, and when he refused, they simply withdrew the Second Arbitration and vacated the award secured in the First Arbitration. The purported justification for this sellout of the Mademoiselle Workers' rights was that, in the context of an overall settlement of outstanding issues with Claiborne, it was necessary to jettison the Mademoiselle Workers and abandon the Arbitrations. However, as a result, Claiborne paid UNITE $20.5 million (denominated as liquidated damages), while contemporaneously settling the Mademoiselle Workers' claims for only $750,000, which was conditioned on a release by the Mademoiselle Workers of all the Union Defendants of all claims including a breach of the DFR.

No purported historical context or claim that the Union Defendants simply were exercising their discretion can conceal or justify the acceptance by the Union Defendants of this $20.5 million payoff. Nor can any explanation hide the fact that UNITE instructed the attorney chosen to represent the Mademoiselle Workers and to commence an arbitration on behalf of the Mademoiselle Workers, to purposely lose that arbitration. The Union Defendants' purported justification, that in order to extract a more favorable collective bargaining agreement with Claiborne, they had to in effect sell out over 500 of their members, is insufficient to find as a matter of law that those actions were not arbitrary or taken in bad faith.

The Union Defendants have worn so many hats in this matter, that, until this point, they have successfully avoided all responsibility for the actions taken which resulted in a substantial financial benefit to UNITE while at the same time

nearly 600 Mademoiselle Workers lost their livelihoods. At no point has UNITE explained how its $20.5 million cash infusion from Claiborne actually benefitted its members, although the evidence is clear that a mere $750,000 was accepted in return for the utter dismantling of the Mademoiselle work force. Moreover, it is clear that the outcome of the aborted Second Arbitration would have directly benefitted the Mademoiselle Workers in an amount substantially in excess of $750,000, and indeed estimated by the Union Defendants to be in the range of over $20 million. Unions are supposed to represent their workers, not to sacrifice their workers in order to line their own pockets, yet that is precisely what occurred here — a result which was allowed to stand by the lower courts.

PROCEEDINGS BELOW

All of the defendants, which then included Claiborne, moved to dismiss the First Amended Complaint. In a decision dated August 18, 1998, the District Court for the Southern District of New York granted the motion of Claiborne, but denied the motions of two of the union entities on the DFR claims. The Court also dismissed the claims under Section 302 of the Labor Management Relations Act.

In an Opinion and Order dated January 5, 1999, the District Court for the Southern District of New York granted the Mademoiselle Workers' motion to certify this action as a class action.

The Union Defendants subsequently moved for summary judgment seeking dismissal of the entire First Amended Complaint. In a Memorandum and Order dated August 30,

1999, the District Court for the Southern District of New York granted the Union Defendants' joint motion for summary judgment.

A final judgment dismissing the First Amended Complaint and closing the case was entered on September 2, 1999.

The Mademoiselle Workers filed their Notice of Appeal on September 27, 1999.

On May 23, 2000, the United States Court of Appeals for the Second Circuit affirmed the decision of the District Court for the Southern District of New York.

A Petition for Rehearing was timely filed by the Mademoiselle Workers and on June 16, 2000, the United States Court of Appeals for the Second Circuit denied the Mademoiselle Workers' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

In affirming the decision of the District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit left the Mademoiselle Workers' class entirely without a remedy, and without recourse to the courts for a wrong which clearly could not have been anticipated within the statutory scheme.

It cannot be the law that a union, which undertakes the prosecution of an arbitration on behalf of members of an affiliated union — which union could not, itself, due to the statutory framework, have brought the arbitration — has no legal duty towards the members of the affiliated union on whose behalf the arbitration was brought.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THE UNION DEFENDANTS OWED THE MADEMOISELLE WORKERS A DFR OR SIMILAR FIDUCIARY DUTY

I.

THE GARMENT INDUSTRY PROVISO IMPOSES A DFR OR SIMILAR FIDUCIARY DUTY UPON ALL OF THE UNION DEFENDANTS

This Court has admonished labor unions that "the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74 (1991). Each of the Union Defendants have thus far been able to avoid accountability as a matter of law for their egregious, self-interested actions and to escape liability by in effect playing a "shell game" whereby each denies owing any duty to the Mademoiselle Workers concerning the manner in which they first asserted claims on their behalf against Claiborne, and then sold out the Mademoiselle Workers in exchange for a payoff. This denial of responsibility, a position accepted as a matter of law by the District Court and Court of Appeals below, destroyed the livelihoods of the Mademoiselle Workers who were induced to join UNITE on the basis of a long-term work commitment from Claiborne and then were represented by UNITE and its affiliated locals in the Arbitrations when Claiborne reneged on its commitment. This finding of no breach of any fiduciary duty irrespective of how improper the conduct, also insults the statutory precept of union

representation which, while providing a union with the right to represent its member workers, also provides that with that right comes the duty to act in good faith.

The District Court was sympathetic to the Workers' plight, stating, "... *I am critical of what appears to me to be the unions' conduct here...*", (Appendix B) (emphasis added). It however, found itself constrained to find that no duty was owed by any of the Union Defendants to the Mademoiselle Workers. Citing to authority in industries other than the garment industry, the District Court and the Court of Appeals found that *only* the collective bargaining unit's exclusive bargaining agent could owe the members of that collective bargaining unit a DFR and that since Local 155 played no role in the Arbitrations it breached no duty to the Mademoiselle Workers. However, cases outside of the garment industry are irrelevant to the issues presented in this case, since the unique structure of the garment industry permitted a union local, other than the union local that was the exclusive bargaining agent of the Mademoiselle Workers, to commence and represent the Mademoiselle Workers in the Arbitrations. Technical labels are irrelevant; the very act of bringing and then improperly settling the Arbitrations on behalf of the Mademoiselle Workers is what should be found to create the DFR or similar fiduciary duty. For the result to be otherwise only opens the door to abuses such as those which occurred in this case.

The Garment Industry Proviso allows unions in the garment industry to represent the interests of a contractor's employees in dealing with jobbers and allows garment industry unions to represent the interests of jobbers' employees in dealings with contractors, even though the unions representing jobbers are not technically the exclusive

bargaining agents of the unions representing contractors and *vice versa*. The garment industry union locals in fact work in unison under the guidance of their parent, UNITE, to coordinate the representation of contractors' employees and jobbers' employees in negotiations with contractors and jobbers. Contractors whose employees are members of a UNITE local always have a clause in their collective bargaining agreements, as is the case here, that proclaims the "Unity of Interest" between jobbers and contractors and the UNITE locals that represent the employees of each. Indeed, in no other industry could one union bring an arbitration on behalf of an affiliated union's members. Under this scheme, which creates a right of one union to act on behalf of another, there must be a concomitant duty and remedy, if the union acting on behalf of its affiliate causes harm to the affiliate's members.

In the context of this case, this close relationship can be shown by the fact that Local 23-25, a union whose employees were completely unaffected by the Claiborne — Mademoiselle commitment, originally negotiated the commitment to provide Mademoiselle Workers with more work, and when that commitment was breached, initiated the First Arbitration; and when the award was breached, initiated the Second Arbitration. In no other industry would Local 23-25 have been allowed to negotiate or enforce that commitment and sue for its breach. On the other hand, Local 155, which did represent the Mademoiselle Workers in their relationship with their employer, Mademoiselle, had no direct contractual relationship with Claiborne, and, therefore, could not initiate the Arbitrations against Claiborne. Moreover, UNITE, which placed the Mademoiselle Workers in Local 155, controlled both Local 23-25 and Local 155, and made the ultimate decision that Local 23-25 *should pursue and then abandon the Arbitrations*.

The Arbitrations were initiated to preserve the specific rights of specific union members, in this case, the rights of the Mademoiselle Workers to the work commitment made by Claiborne. Accordingly, in the words of the arbitrator, the First Arbitration "[was] not an ordinary labor-management dispute." Having prosecuted the Arbitrations to benefit the Mademoiselle Workers, the Union Defendants should not be allowed to cast off these workers, and surely not in order to confer a large financial benefit upon themselves, with no review by any Court. In this case because both the District Court and the Court of Appeals held that, as a matter of law, there was no duty, the Union Defendants' actions will never be reviewed and they will have been permitted to act with absolute impunity.

II.

EACH OF THE UNION DEFENDANTS ACTED AS THE OTHER'S AGENT IN PROSECUTING AND SUBSEQUENTLY ABANDONING THE ARBITRATIONS AND, THEREFORE, EACH OWED THE MADEMOISELLE WORKERS A DFR OR SIMILAR FIDUCIARY DUTY

The Court of Appeals was incorrect in not addressing the agency issue raised by the Mademoiselle Workers. If the Arbitrations had been brought by Local 155, there would be no dispute that the DFR owed by that local to its members would apply to the commencement, prosecution and settlement of the Arbitrations. The Court of Appeals allowed Local 23-25 and UNITE to avoid their duty as well, stating that a DFR is owed only by the exclusive bargaining agent with respect to a particular matter. However, with reference to bringing, prosecuting, and ultimately settling the

Arbitrations, Local 23-25 and UNITE were, at least, the *de facto* exclusive representatives of the Mademoiselle Workers. The Garment Industry Proviso allowed them to act in that capacity on behalf of the Mademoiselle Workers, and, as such, they owed the Mademoiselle Workers a duty. In addition they were the only entities that could initiate the Arbitrations.

In addition, the fact that UNITE caused Local 23-25 to commence the Arbitrations rather than Local 155 (both locals being under the control of UNITE) should not, in the context of the Arbitrations to enforce Claiborne's commitment, result in the elimination of *all* duty on the part of *any* union *vis a vis* the members of Local 155 on whose behalf the commitment was secured. Following such reasoning, no union owed any duty whatsoever to the Mademoiselle Workers in the context of the Arbitrations, thereby allowing the Union Defendants to act in utter disregard of the rights of the Mademoiselle Workers and without any accountability to anyone, including any Court. Such is not and cannot be the law.

Instead, to the extent entities other than Local 155 participated in the Arbitrations, they assumed a duty to the members of Local 155 whose interests the Arbitrations sought to protect and whose jobs the Arbitrations sought to ensure. To allow garment industry unions the benefit of such action, without imposing upon them a concomitant duty to the parties they represented, is inequitable and cannot be what Congress envisioned when enacting the Garment Industry Proviso.

Thus, Local 23-25 was acting, in effect, as an agent on behalf of its sister local. As a result, the duty owed by Local

155 to its members extends to both Local 23-25, the entity bringing the Arbitrations, and UNITE, the entity controlling both Local 155 and Local 23-25 and the Arbitrations.

It is axiomatic that a union is bound by the acts of its agent. *See Carbon Fuel Co. v. Mine Workers,* 444 U.S. 212, 100 S.Ct. 410, 62 L. Ed. 2d 394 (1979). Similarly, an agent assumes the duties of its principal, and a principal may be held liable for the acts of its agent. *Alexander v. Local 496*, 177 F.3d 394, 409 (6th Cir. 1999), *cert. denied*, 120 S. Ct. 1158 (2000).

In the labor law context, agency can be established among international unions and their locals through a "close relationship", participation in or approval of conduct, or other "sufficient conduct." *See Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1997). Thus, an international union has been held liable for the actions of an affiliated local, if the local acted as the international's agent. *See Alexander*, 177 F.3d 394 (6th Cir. 1999), *cert. denied*, 120 S. Ct. 1158 (2000); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989).

The conduct of the Union Defendants clearly meets these standards for establishing a principal and agent relationship. Unlike the *Berger* and *Alexander* cases, however, where the local acted as the international's agent, here Local 155 acted as the principal because it owed its members a legal duty to protect their rights, and Local 23-25 and UNITE acted as its agents to fulfill that duty by commencing the Arbitrations on behalf of the Local 155 represented Mademoiselle Workers. As a consequence of this agency relationship, each of Local 23-25 and UNITE, in addition to Local 155, owed

a duty to the Mademoiselle Workers in the context of the Arbitrations.

Finally, the Court of Appeals upheld Local 155's contention that it had no part in the transactions at issue in this matter. This finding is contrary to the record. On the other hand, even if it were true, Local 155 then allowed a sister union to bargain away the rights of Local 155's members, while remaining absolutely silent. This is a clear breach of Local 155's duty to its members. In fact, Local 155 had an integral role in transmitting releases to its members (the "Releases") to be executed by them in order to receive a distribution from the financial assistance fund established by Claiborne for their benefit (the "Financial Assistance Fund"). Moreover, Local 155 itself was one of the parties to be released pursuant to the Releases and one of the released claims was the DFR.

One must question why a release in favor of Local 155, covering the settlement agreement between UNITE and Claiborne (the "Settlement Agreement") was necessary if Local 155 owed no duty to the Mademoiselle Workers relating to the Arbitrations and the claims asserted therein and their abandonment. Such action by Local 155 acts as a ratification of the acts of Local 23-25 and UNITE, as its agents. *Kozera v. Westchester Fairfield Chapter of National Electrical Contractors Ass'n*, 714 F. Supp. 644, 648 (S.D.N.Y. 1989) ("Section 301(b) provides that a union is bound by the acts of its agent. See 29 U.S.C. § 185(b) (1982)."), *rev'd on other grounds*, 909 F.2d 48 (2d Cir. 1990); *Cf., Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1426 (D.C. Cir. 1988) (for union to be liable, it must instigate, support, ratify or encourage acts of affiliated union). Since the Settlement Agreement

encompassed actions to be taken on behalf of and towards the members of Local 155, how can Local 155 claim it had no interest in the subject matter of the Arbitrations? Similarly if Local 23-25 and UNITE owed no duty to the Mademoiselle Workers, why was a release of any claim against them, including the DFR, a condition of receipt of the Financial Assistance Fund?

The Union Defendants had a unity of interest, which resulted in their actions taken as agents for one another. In this agency context, each action taken by each Union Defendant, which resulted in the destruction of the livelihoods of the Mademoiselle Workers, was an action taken by that union in breach of its duty to those Mademoiselle Workers.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 23, 2000

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23 day of May, Two Thousand.

PRESENT: HONORABLE FRED I. PARKER
HONORABLE CHESTER J. STRAUB
HONORABLE ROBERT A. KATZMANN
Circuit Judges.

No. 99-9147

CHUN HUA MUI, JOSEFA GANTES, and FONG TSE TSUI, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO, KNITGOODS WORKERS' UNION, LOCAL 155, AND BLOUSE, SKIRT,

Appendix A

SPORTSWEAR, CHILDREN'S WEAR AND ALLIED WORKERS' UNION, LOCAL 23-25,

Defendants-Appellees.

* * *

Appeal from the United States District Court for the Southern District of New York (Harold Baer, Jr., *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said District Court be and it hereby is AFFIRMED.

Appellants appeal from a final judgment of the United States District Court for the Southern District of New York (Harold Baer, Jr., *Judge*), entered September 2, 1999, granting summary judgment to Appellees Union of Needletrades, Industrial and Textile Employees, AFL CIO ("UNITE"), Blouse, Skirt, Sportswear, Children's Wear and Allied Workers' Union, Local 23-25 ("Local 23-25"), and Knitgoods Workers' Union, Local 155 ("Local 155"). *See Mui v. Union of Needletrades, Industrial and Textile Employees, AFL CIO*, No. 97-civ-7270, 1999 WL 675982 (S.D.N.Y. Aug. 31, 1999) ("*Mui II*").

Appellants commenced this class action on behalf of themselves and fellow union workers of Mademoiselle Knitwear, Inc. ("Mademoiselle"). UNITE is an international labor organization that represents apparel workers. Local 155 is a local union affiliated with UNITE and is the official collective bargaining representative for apparel workers

employed by Mademoiselle. Local 23-25 is a local union affiliated with UNITE and represents certain employees of Liz Claiborne, Inc., ("Claiborne"), which engages in the business of wholesale and retail apparel.

Until 1997, Claiborne was a member of the New York Skirt & Sportswear Association, Inc., ("Association") and was bound by a collective bargaining agreement between the Association and Local 23-25 ("Association Agreement"). In addition to covering the terms and conditions of employment for some of Claiborne's New York employees, the Association Agreement contained traditional garment industry "jobbers' " provisions, which prohibited Claiborne from contracting with non-union facilities for the production of its garments and from importing its garments.

In or about July 1992, Claiborne made an oral commitment to Edgar Romney, Manager of Local 23-25 and Executive Vice President of UNITE, and to Mademoiselle to order 10,000-12,000 *dozen* units (primarily sweaters) per month from Mademoiselle. This commitment would produce work for approximately 600 workers at Mademoiselle. In the spring of 1995, Claiborne informed the union Appellees that Mademoiselle was not producing timely and quality products. As a result, the verbal agreement was renegotiated to reduce the purchases from Mademoiselle to approximately 50,000 units per month for a two-year period. The renegotiated commitment was memorialized in a letter from Romney to Shraga Newhouse, President of Mademoiselle.

In December 1995, Local 23-25 sought arbitration ("First Arbitration"), arguing that Claiborne was fabricating claims

that Mademoiselle was having production problems in order to reduce its purchase commitment. The arbitrator found in favor of Local 23-25 and ordered Claiborne "to continue to give work to Mademoiselle at the rate of 600,000 units (sweaters) annually . . . during the period up to June 30, 1997."

In September 1996, Local 23-25 made a second demand for arbitration against Claiborne ("Second Arbitration") on the ground that Claiborne continued to evade its commitment to Mademoiselle. In its demand, Local 23-25 sought: (1) an order compelling compliance with the purchase commitment embodied in the First Arbitration award; (2) a declaration that the purchase commitment was automatically renewable for a period commensurate with a collective bargaining agreement to be reached between Mademoiselle and "an affiliate of UNITE" (presumably Local 155); and (3) damages for Claiborne's breach.

During the pendency of the Second Arbitration, UNITE and several of its affiliated locals, including Local 23-25, were negotiating with Claiborne for new collective bargaining agreements. On or about May 16, 1997 (following the close of the Second Arbitration hearing, but prior to a decision), Claiborne reached several agreements with Local 23-25 and/or UNITE. First, UNITE and Claiborne reached an agreement "govern[ing] the overall relationship between [Claiborne] and [UNITE] including [Claiborne's] use of contractors to produce its garments," ("Jobbers' Agreement"). This agreement, effective June 1, 1997 through May 31, 2000, requires, inter alia, Claiborne to "confine its production to workers employed [in-house] or in shops of contractors in contractual relations with [UNITE] or its

affiliates." The Jobbers' Agreement does not, however, "create or enlarge any existing obligation to the workers employed in any [particular] contractor's shop." The contract also limits Claiborne's liability for violations of the contract to liquidated damages in the amount of $2.5 million per year.

Second, UNITE and Local 23-25 also reached an agreement with Claiborne, settling "any and all claims arising under the Association Agreement or otherwise that have been or could have been asserted against [Claiborne]," ("Letter Agreement"). Among other things, the Letter Agreement required Claiborne to pay $13 million in liquidated damages to Local 23-25 in satisfaction of all liquidated damage or other obligations to Locals 10, 23-25, 99 of UNITE, and UNITE arising through the term of the Association Agreement.

Third, UNITE and Local 23-25 reached an agreement with Claiborne that settled the claims brought in the Second Arbitration ("Settlement Agreement"). The terms of the Settlement Agreement provided, inter alia: (1) that the First Arbitration award and an interim determination in the Second Arbitration were null and void; (2) that Claiborne would pay $750,000 to a Financial Assistance Fund ("Fund") to be established by Local 23-25 "on behalf of the Local 155 represented employees of Mademoiselle . . . who have suffered or may suffer a loss of employment," and (3) that Local 23-25 and UNITE released all claims against Claiborne relating to commitments made by Claiborne to purchase goods from Mademoiselle.

In a letter dated September 26, 1997, Local 155 advised its eligible members of the requirements for receiving their

share of the Fund, including execution of an enclosed Agreement and Release ("Release"). The letter directed employees to "[c]onsult an attorney before [they] sign[ed] this document." The letter also explained that "[b]y signing the [Release employees would] give up any right to sue Local 23-25, UNITE or Local 155 concerning any claim relating to any alleged commitment by Liz Claiborne to provide work to Mademoiselle or its employees or concerning payments from the [Fund]."

The three-page Release included, inter alia: (1) a brief explanation of the background of the claims brought in the Second Arbitration; (2) the formula and requirements for distribution; (3) notice that taxes were not being withheld; and (4) language releasing the three union Appellees from any claims related to the Claibōrne purchase commitments, the settlement of the Second Arbitration, and/or the Fund. The second line of the Release (just below the document title) stated in bold, capitalized letters: "Consult with a lawyer before singing this document." In a section entitled "Opportunity to Consider the Agreement," the Release stated that "the Union has advised me to consult an attorney before signing this Agreement and Release." Ultimately, 204 employees executed Releases. Each of the 204 received $3,846.

Appellants' Amended Complaint asserts six claims: (1) against all union Appellees, for breach of the duty of fair representation; (2) against Claiborne and UNITE, for violation of § 302 of the Labor Management Relations Act; (3) against Claiborne, for breach of contract; (4) against Claiborne, for injunctive relief with respect to the commitment to provide work orders to Mademoiselle;

(5) against all union Appellees, for injunctive relief with respect to the settlement releases; and (6) against all union Appellees, for a declaratory judgment invalidating any and all previously obtained settlement releases.

Upon a motion filed by Appellees pursuant to Fed. R. Civ. P. 12(b)(6), the district court dismissed the first cause of action as against Local 155 only and causes of action two through five entirely, and denied the motion with respect to cause of action six as to all union Appellees. *See Mui v. Union of Needletrades, Industrial and Textile Employees, AFL CIO*, 1998 WL 513052, at *8 (S.D.N.Y. Aug. 19, 1998) ("*Mui I*"). Subsequently, the district court granted summary judgment to the union Appellees on the grounds that neither UNITE nor Local 23-25 owed a duty of fair representation to Appellants and, although somewhat unclear, that Local 155 did not breach any duty it owed to Appellants in connection with the Release. *See Mui II*, 1999 WL 675982, at *2-3.

On appeal, Appellants argue that the Appellees UNITE and Local 23-25 owed them a duty of fair representation with respect to the prosecution and settlement of the arbitrations against Claiborne on the ground that the three union Appellees should be treated as a single entity because of the "unity of interest" that exists among them in the specialized world of the garment industry. More specifically, Appellants contend that the garment industry is unique because the so-called "Garment Industry Proviso," 29 U.S.C. § 158(e), ("Proviso") to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, ("NLRA") allows unions representing the employees of a jobber, e.g., Claiborne, to also represent the interests of the employees of a contractor, e.g., Mademoiselle,

which does business with a jobber. In Appellants' view, Local 23-25 and UNITE invoked this right by prosecuting the two arbitrations against Claiborne, and therefore assumed a duty of fair representation to the employees of Mademoiselle. In addition, Appellants contend that Local 155 owed them a duty in connection with the distribution of the Release. We disagree.

Generally, the duty of fair representation arises only with respect to a union entity that is certified as the exclusive bargaining representative of a group of employees. *See Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 86-87 (1989) (The duty of fair representation "arises . . . from the grant under § 9(a) of the NLRA . . . of the union's exclusive power to represent all employees in a particular bargaining unit."); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation."); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1251 (2d Cir. 1970) (The duty of fair representation is "derived from a union's statutory right to be the exclusive representative of the members of a designated unit, from which the Supreme Court found an implied statutory obligation to give members equal representation."). As Appellants recognize, however, neither UNITE nor Local 23-25 is Appellants' exclusive bargaining representative.

Further, even Appellants concede that their contention that they fall within the "exception to the certification requirement [that] obtains when a union holds itself out as

exclusive representative with the intent and effect of creating reliance thereon," *Quarles v. Remington Arms, Co.*, 848 F. Supp. 328, 331 (D. Conn. 1994) (internal quotations omitted), is a weak one. Indeed, Appellants cannot demonstrate the required reliance because they were not aware of the arbitrations or the contract negotiations until May 1997, at which time Mademoiselle informed its employees about these events.

Similarly, Appellants' reliance on the Proviso is misplaced. The Proviso is an exception to the NLRA's prohibitions against entering into and enforcing so- called "hot cargo agreements," which bar an employer from handling or otherwise dealing with the products of other employers. *See* 29 U.S.C. § 158, (b)(4), (e). The Proviso simply permits (1) unions and employers to enter into jobbers' agreements and (2) the enforcement of those agreements by unions. A jobbers' agreement, like the jobbers' provisions included in the Association Agreement, promotes the general goal of eliminating sweatshop conditions in the garment industry by precluding clothing designers from escaping unionization by outsourcing production to nonunion sweatshops. Although a jobbers' agreement may serve as a catalyst for unionization of contractors' employees, the agreement does not control the terms and conditions of their employment. Only a collective bargaining agreement negotiated between the contractor and the union selected by the employees to serve as their bargaining representative can serve that function. Consequently, neither the Proviso, the jobbers' provisions of the Association Agreement negotiated pursuant to the Proviso, nor the prosecution and settlement of the arbitrations

create a duty running from either Unite or Local 23-25 to Appellants.[1]

Finally, none of the union Appellees owed or breached a duty to Appellants with respect to the Release. As discussed above, neither Local 23-25 nor UNITE owed a duty of fair representation to Appellants. With regard to Local 155, Appellants do not cite to any evidence that Local 155 drafted the Release or participated in the decision to require execution of the Release in exchange for receipt of shares from the Fund. Furthermore, the terms of the Settlement Agreement between Local 23-25 and Claiborne required Claiborne to pay $750,000 to Local 23-25, not Local 155, for establishment of the Fund. Under these circumstances, the grant of summary judgment on count six was proper.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: s/ Lucille Carr
Lucille Carr, Operations Manager

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1. Appellants have also argued that Local 155 may be said to have breached its duty of fair representation to them because Local 23-25 and UNITE were acting as Local 155's agents in negotiating the Settlement Agreement. This argument was not, however, presented to the District Court, and was only raised in the Appellants' reply brief on appeal. Therefore, the argument has been waived. *See Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999).

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 30, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 7270 (HB)

CHUN HUA MUI, JOSEFA GANTES, and OI FONG TSE TSUI, on behalf of themselves and all others similarly situated,

Plaintiffs,

– against –

UNION OF NEEDLETRADES, INDUSTRIAL and TEXTILE EMPLOYEES, AFL-CIO, BLOUSE, SKIRT, SPORTSWEAR, CHILDREN'S WEAR and ALLIED WORKERS' UNION, LOCAL 23-25; and KNITGOODS WORKERS' UNION, LOCAL 155,

Defendants.

MEMORANDUM & ORDER

Hon. Harold Baer, Jr., District Judge:[1]

Defendants Union of Needletrades, Industrial and Textile Employees, AFL-CIO ("UNITE"), Blouse, Skirt, Sportswear,

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1. Nancy M. López, a second-year student at New York Law School, assisted in the research and preparation of this opinion.

Children's Wear and Allied Workers' Union, Local 23-25 ("Local 23-25"), and Knitgoods Workers' Union, Local 155 ("Local 155"), move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons discussed below, the defendants' motion is GRANTED.

I. BACKGROUND

An abbreviated set of facts is as follows.[2] Plaintiffs Chun Hua Mui, Josefa Gantes, and Oi Fong Tse Tsui, commenced this class action suit on behalf of union workers employed by Mademoiselle Knitwear, Inc. ("Mademoiselle). UNITE is an international labor organization that represents apparel workers. Local 23-25 is affiliated with UNITE and represents certain employees of Liz Claiborne Inc. ("Claiborne"), a former named-defendant in this case.[3] Local 155, also affiliated with UNITE, represents apparel workers at Mademoiselle and is the official bargaining representative for those employees.

In the early 1990s, Claiborne entered into several multi-year, high-volume production agreements with Mademoiselle and Local 23-25 whereby Claiborne, a jobber, agreed to order a minimum quantity of sweaters per year from its contractor, Mademoiselle. Around the spring of 1995, however, Claiborne began sending production orders

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2. A more detailed discussion of the facts can be found in *Mui v. UNITE*, 1998 WL 513052 (S.D.N.Y. Aug. 19, 1998).

3. Claiborne engages in the business of wholesale and retail apparel, and was previously dismissed from the case. *See Mui v. Unite*, 1998 WL 513052 (S.D.N.Y. Aug. 19, 1999).

below the agreed-upon monthly goals. It purported to explain the shortfalls by stating that the quality of Mademoiselle's sweaters and the timeliness of the their deliveries had "dropped off."

In late 1995, UNITE, through Local 23-25, sought arbitration (the "first arbitration") against Claiborne, arguing that it had fabricated claims against Mademoiselle in order to reduce its production commitments. The arbitrator agreed, and directed Claiborne to comply with its original agreements.

In September 1996, a second demand for arbitration (the "second arbitration") was filed by UNITE, through Local 23-25, against Claiborne.[4] This time, the union sought over $30 million in damages on the ground that Claiborne was continuing to evade its production commitments to Mademoiselle.

Following the close of the second arbitration, but before an award was rendered, UNITE and Claiborne — without consulting Mademoiselle's workers — reached a settlement whereby Claiborne terminated its obligation to order sweaters from Mademoiselle. As part of the settlement, Claiborne agreed to immediately pay UNITE $13 million in liquidated damages, with an additional $7.5 million to be paid over the following three years. In addition, UNITE and Local 23-25 agreed to deem the first arbitration award null and void. None of the $20.5 million accrued to Mademoiselle's workers,

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4. The plaintiffs allege that UNITE and Local 23-25 sought arbitration in both instances on behalf of the union workers at Mademoiselle.

though Claiborne did establish a $750,000 Financial Assistance Fund (the "Fund") for Mademoiselle workers who were essentially out of work following the settlement. To receive their share of the fund, the employees were required to execute a release that relinquished any potential claims against the defendant unions that arose out of the settlement. As of December 5, 1997, 204 employees had executed releases.

The plaintiffs commenced this suit on September 30, 1997, and subsequently filed an amended complaint on October 15, 1997. The amended complaint asserted six causes of action: (1) against all union defendants, for breach of the duty of fair representation; (2) against Claiborne and UNITE, for violation of § 302 of the Labor Management Relations Act ("LMRA"); (3) against Claiborne, for breach of contract; (4) against Claiborne, for injunctive relief with respect to the commitment to provide work order to Mademoiselle; (5) against all union defendants, for injunctive relief with respect to the settlement releases; and (6) against all union defendants, for a declaratory judgment invalidating any and all previously obtained settlement releases.

Thereafter, the defendants moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the amended complaint. I dismissed causes of action two through five entirely, and dismissed the first cause of action as against Local 155 only. I denied the motion with respect to the first cause of action against UNITE and Local 23-25 and cause of action six as to all union defendants. *See Mui v. UNITE*, 1998 WL 513052, at *8 (S.D.N.Y. Aug. 19, 1998).

Appendix B

By opinion dated January 5, 1999, I granted the plaintiffs' motion to certify a class of approximately six hundred current and former union-represented employees of Mademoiselle who were employed when the agreements to settle the arbitrations were reached. *See Mui v. UNITE*, 1999 WL 4918 (S.D.N.Y. Jan. 5, 1999). By order dated June 25, 1999, I directed the plaintiffs to issue a formal notice to the class members in this case, keeping in mind the September 1999 trailing trial calendar. Without explanation or excuse, the plaintiffs simply failed to do so.

II. DISCUSSION

A. Standards for Summary Judgment

Summary judgment is properly granted only when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). The substantive law determines what facts are material to the determination. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In assessing the record before the court, the "non-movant will have his allegations taken as true," *Distasio v. Perkin Elmer Corporation*, 157 F.3d 55, 61 (2d Cir. 1998), but he or she may not oppose summary judgment merely by offering conclusory allegations or denials. *See Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 101 (2d Cir. 1997).

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B. *Duty of Fair Representation*

1. Exclusive Bargaining Representative

As a general rule, the duty of fair representation arises only with respect to a union entity that is certified as the exclusive bargaining representative of a group of employees. *See Air Line Pilots Association, International v. O'Neill*, 499 U.S. 65, 74 (1991). However, "an exception to the certification requirement obtains when a union holds itself out as exclusive representative with the intent and effect of creating reliance thereon." *Quarles v. Remington Arms, Co.*, 848 F. Supp. 328, 331 (D. Conn. 1994) (internal quotations omitted). Indeed, in such cases, the union may be thereafter estopped from denying its status as the employees' exclusive representative. *Id.* (citing *Chavez v. United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 779 F.2d 1353, 1357 (8th Cir. 1986)). The plaintiffs have relied on this exception, but unfortunately, the instant case fails to fit within it.

While it is undisputed that Local 155 is the official bargaining representative for Mademoiselle employees, the plaintiffs' bald assertions that Local 23-25 and UNITE held themselves out as the plaintiffs' exclusive bargaining representatives and that the plaintiffs actually relied on such representations is belied by the undisputed facts. To support the plaintiffs' claim that the union defendants held themselves out as the exclusive bargaining representatives, the plaintiffs simply *allege* that the arbitrations were brought on behalf of Mademoiselle's workers by UNITE, through Local 23-25. The plaintiffs fail to point to a single fact that

supports this assertion,[5] and it is clear that the factual record is indeed devoid of any support for this proposition. With respect to the "reliance" prong of the *Quarles* analysis, the depositions of the class representatives defeat the notion that they or any other Mademoiselle employees relied upon UNITE and 23-25's alleged representations. For example, neither plaintiff Chun Hua Mui nor Josefa Gantes suggest that Local 23-25 or UNITE had represented them in connection with either the arbitrations or the collective bargaining sessions with Claiborne. Indeed, the plaintiffs were not even *aware* of the arbitration or the contract negotiations until May 1997, at which point representatives of Mademoiselle — not the defendant unions — told the employees about these developments.

In addition to the *Quarles* exception, the plaintiffs argue that there exists a "unity of interest" among the two defendant locals and UNITE that allows the Court to treat the three defendants as a single entity. This, in turn, would justify precluding the unions from denying their role as the plaintiffs' exclusive bargaining representatives. This purported "unity of interest," the plaintiffs contend, is particularly acute in the garment industry since the conditions of one group of textile workers affects the working conditions of every other textile worker. As such, "a unity of interest exists between the members of the Union of Needletrades, Industrial and Textile Employees ("UNITE") regardless of the respective shops in which they are employed." (Pls.' Mem. Opp. Summ. J. at 10-11.)

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5. This is perhaps due in large part to the plaintiffs' inexplicable failure to conduct much — if any — discovery in this case.

While the plaintiffs' argument has some cogency and makes much intuitive sense, it is wholly devoid of support in the case law, a fact not really disputed by the plaintiffs. (*See* Pls.' Mem. Opp. Summ. J. at 10-12.) Moreover, the plaintiffs' reliance on *R.M. Perlman, Inc. v. New York Coat, Suite Dresses, Rainwear & Allied Workers Union, Local 89-22-1*, 33 F.3d 145 (2d Cir. 1994) is misplaced. *Perlman* simply discusses how the history and status of the garment industry justified the enactment of a *statutory* exemption for garment industry unions from the anti-secondary boycott provisions of the National Labor Relations Act. *Id.* at 152-153. Nowhere does this case suggest that the courts are free to infer a similar, judicially-created exemption for the statutory-based prerequisites of a duty of fair representation claim. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967) ("Under [the duty of fair representation], the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination . . . .").

While I am critical of what appears to me to be the unions' conduct here, my reading of the Supreme Court and Second Circuit precedents is clear and without a doubt forecloses the plaintiffs' cause of action. A *nisi prius* court follows precedent — higher courts make law. Perhaps it is there that the plaintiffs' arguments will prevail.

III. CONCLUSION

Because I find that the defendant unions did not owe a duty of fair representation to the plaintiffs, the causes of action against these defendants based on an alleged breach

of that duty fail as a matter of law. Accordingly, the defendants' motion is GRANTED, and the plaintiffs' amended complaint is DISMISSED. The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: August 30, 1999
New York, New York

s/ Harold Baer, Jr.
U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 16, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16 day of June, Two Thousand.

Present:

Hon. Fred I. Parker
Hon. Chester J. Straub
Hon. Robert A. Katzmann

CIRCUIT JUDGES,

Docket No. 99-9147

Chun Hua Mui, et. al.,

Plaintiffs-Appellants,

Appendix C

Union of NeedleTrades, et. al.,

Defendants-Appellees.

A petition for panel rehearing having been filed herein by appellants Chun Hua Mui, et. al.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney